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No. 02-1606

In The
Supreme Court of the United States

TENNESSEE STUDENT ASSISTANCE CORPORATION,

Petitioner,

v.

PAMELA L. HOOD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For the Sixth Circuit

BRIEF FOR BERNARD KATZ, LIQUIDATING SUPERVISOR OF THE BANKRUPTCY ESTATE IN *IN RE WALLACE'S BOOKSTORES, INC.*, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

P. ANTHONY SAMMONS
Counsel of Record
ALLEN E. GRIMES, III
DINSMORE & SHOHL, LLP
250 W. Main St., Suite 1400
Lexington, Kentucky 40507
(859) 425-1000
(859) 425-1099 (FACSIMILE)

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QUESTION PRESENTED

Whether Congress has the authority to abrogate state sovereign immunity under the Bankruptcy Clause, U.S. CONST. Art. I, § 8, cl. 4.

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INTEREST OF *AMICUS CURIAE*

Bernard Katz is the Liquidating Supervisor of the Bankruptcy Estate in *In re Wallace's Bookstores, Inc.*, No. 01-50545, pending in the United States Bankruptcy Court for the Eastern District of Kentucky.[1] Prior to filing its Petition for Chapter 11 bankruptcy protection, Wallace's Bookstores, Inc., and its subsidiaries, constituted one of the nation's largest suppliers of college textbooks to educational institutions of higher learning. Wallace's Bookstores, Inc. owned, operated or managed ninety-one bookstores at colleges or universities located in twenty-five states. At least forty-five of these colleges were state institutions. The Wallace's Bookstores debtors had various contractual relationships with these schools for the operation of campus bookstores. Subsequent to the filing of the debtors' Petition in bankruptcy, Katz commenced adversary proceedings against many of these schools for the recovery of preferential transfers pursuant to 11 U.S.C. § 547(b) and the collection of accounts receivable.

Given the nature of the debtors' business, Katz, in his capacity as Liquidating Supervisor for the Wallace's Bookstores' Bankruptcy Estate, has a strong interest in the United States Bankruptcy Code's designation of a single forum within which to adjudicate all claims pertaining to a debtor's estate. If Section 106(a) of the Bankruptcy

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[1] In compliance with Rule 37.6 of this Court, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no person or entity, other than this *amicus curiae*, made any monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

Code did not abrogate the States' Eleventh Amendment sovereign immunity, Katz would have had to pursue forty-five separate actions in twenty-three separate states. Moreover, based on this Court's holding in *Alden v. Maine*, 527 U.S. 706, 730 (1999), Katz would be limited to the pursuit of state-law causes of action. The extent to which state-law causes of action exist for recovery of preferential transfers and collection of monies owed varies significantly from state-to-state. Due to the enormous administrative costs that this would have imposed upon the estate and the inconsistency of results, *Amicus* has a substantial interest in the judicial recognition of Congress' authority to abrogate state sovereign immunity in the area of bankruptcy.

SUMMARY OF ARGUMENT

Amicus agrees with Respondent that Congress validly abrogated the States' Eleventh Amendment sovereign immunity through its passage of 11 U.S.C. § 106(a) of the U.S. Bankruptcy Code. Further, Katz agrees with Respondent that Congress passed Section 106(a) pursuant to its valid, constitutional authority vested in it by Art. I, section 8, clause 4 of the U.S. Constitution, which granted Congress the authority "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." The grant to Congress of the authority to pass uniform laws is a broader provision of authority than reflected by Congress' other Article I powers.

An examination of the Founders' intent with regard to the provision of the authority to Congress to pass uniform laws on bankruptcy indicates the Founders' understanding

that the States relinquished their immunity in this area. Hamilton's writings indicate that with regard to common law causes of action for the recovery of debt, the States would continue to enjoy immunity in Federal court. However, with regard to actions legislated by Congress pursuant to its powers to pass uniform laws, the States by definition ceded their immunity, or else uniformity would be an impossibility.

Additionally, the Founders equated legislative jurisdiction with the concept of sovereignty. In accordance with Eighteenth Century jurisprudence, the Founders understood that the entity which possessed the authority to prescribe the law in a nation was the sovereign. This power was not divisible. The Founders conceptualized sovereign immunity as being enjoyed only by the sovereign possessing legislative jurisdiction, because the sovereign that established the laws could not be subject to them as a matter of logic. Under the dual sovereign system established by the Founders, the Federal government and the States were each sovereign in their respective areas. In the area of bankruptcy, the States had surrendered complete legislative authority to Congress. Thus, under the then existing state of jurisprudential thought, the States could not enjoy immunity from bankruptcy laws passed by Congress, as they completely had relinquished prescriptive jurisdiction in this area.

This Court consistently has interpreted Congress' power to legislate under the Bankruptcy Clause as being especially broad and unique. The Court has held that Congress' bankruptcy powers are supreme, unrestricted, and plenary. The broad scope of authority provided to Congress under the Bankruptcy Clause is therefore unique in comparison to its other Article I powers. Consistent with

its previous opinions, the Court should recognize a limited exception to the sovereign immunity doctrine espoused in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and its progeny, based on Congress' plenary power to legislate in the field of bankruptcy.

Finally, the central purpose of the Federal bankruptcy system established by Congress would be undermined if States enjoy sovereign immunity from proceedings in bankruptcy court. The trustees of bankruptcy estates would be forced to pursue States in State courts to the extent permitted by pertinent state law causes of action. In large and complex commercial bankruptcies in which the debtor had conducted business in many jurisdictions, a trustee likely would have to pursue multiple proceedings against a number of different State entities. These multiple proceedings inevitably would result in inconsistent determinations on issues central to the administration of the bankruptcy, such as the debtor's insolvency. In addition to conflicting determinations, the administrative and financial burdens associated with litigation in multiple forums frequently would be cost prohibitive and reduce the ultimate distribution to all creditors.

ARGUMENT

I. THE STATES CEDED THEIR SOVEREIGN IMMUNITY WHEN THEY GRANTED CONGRESS THE AUTHORITY TO PASS "UNIFORM LAWS."

A. The Founders Recognized that the States Necessarily Surrendered Their Sovereign Immunity by Granting Congress Exclusive Authority to Pass Laws on Bankruptcy.

This Court has held that "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" *Alden v. Maine*, 527 U.S. 706, 730 (1999) (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934), in which the Court quoted THE FEDERALIST NO. 81 (Alexander Hamilton)). In order to determine "the contours of [the States'] sovereign immunity," the Court has instructed that an examination of the Founders' understanding at the time of drafting the Constitution is necessary to determine the extent to which the States ceded their authority. *Id.* at 734. According to the Court, the views expressed by Alexander Hamilton, James Madison, and John Marshall during the ratification debates best reveal the Founders' original understanding of the Constitution. *Id.* at 727 (citations omitted).

When discussing judicial power and the scope of authority to be vested in this Court, Alexander Hamilton explained that the Federal courts would not have jurisdiction to entertain suits filed by individuals against the States for the recovery of contractual debts. THE FEDERALIST NO. 81 (Alexander Hamilton). During his explanation,

Hamilton recognized, however, that the States could surrender their immunity and had in certain areas:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force.

Id.

Thus, in discussing the scope of the judicial authority, Hamilton referred to his article on taxation in which he previously had explained the limited circumstances in which the States would be deemed to have alienated their sovereignty.

Hamilton expounded upon the Federal government's power regarding taxation in *The Federalist No.* 32. In *The Federalist No.* 32, Hamilton noted that the States would

retain all the rights of sovereignty they had enjoyed before the Constitutional Convention which were not exclusively delegated to Congress. THE FEDERALIST NO. 32 (Alexander Hamilton). With regard to the delegation of powers to Congress, Hamilton wrote:

> This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where the Constitution in express terms granted an exclusive authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.

Id. (emphasis in original).

As an example of the third case in which the States would be deemed to have alienated their sovereignty, Hamilton referenced Congress' power regarding naturalization pursuant to Article I, section 8, clause 4 of the U.S. Constitution. Hamilton considered it significant that the clause declared "Congress shall have power 'to establish an UNIFORM RULE of naturalization throughout the United States.'" *Id.* (emphasis in original). According to Hamilton, Congress' power "must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE." *Id.* (emphasis in original).

As Hamilton's writings reflect, the Founders understood that the States had ceded all authority over naturalization to the Federal government, as reflected in the Constitution's express use of the phrase "uniform rule." In the same clause, the Constitution granted Congress

authority to pass "uniform laws on the subject of bankruptcies." U.S. CONST. art. I, § 8, cl. 4. The only connection between these two areas of law that would explain their inclusion in the same clause is the language regarding uniformity. *See* Eric R. Sender, Note, *The Constitutionality of Section 106: A Historical Solution to a Modern Debate*, 18 BANKR. DEV. J. 131, 153 (2001). Therefore, if Hamilton and the Founders considered the States to have ceded their sovereignty with regard to naturalization, they necessarily had the same understanding concerning the Federal government's bankruptcy power. Madison, for example, expounded at length about the need for uniformity in the area of naturalization. *The Federalist No.* 42 (Madison). With regard to bankruptcy, he considered the necessity of the States' cession to Congress of the authority to pass uniform laws to be self-evident. *Id.* ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the party or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.").

In *The Federalist Nos.* 32 and 81, Hamilton undeniably used the example of Congress' authority to pass uniform laws as an example of the States' cession of their sovereign immunity from federal judicial authority. In the case *sub judice,* the arguments of the *amici* for Hood that the States ceded only their power to legislate and not their immunity from suit is illogical, because Hamilton specifically was addressing the States' immunity from suit in the context of the federal judicial power. *See* "Brief of Ohio and 47 Other States and Commonwealths As *Amici Curiae* in Support of Petitioner," p.9. The Founders unquestionably recognized that, by forming the Union, the States would

cede complete authority in certain limited areas to the Federal government.

The genius of the Founders in drafting the Constitution was to enumerate the powers belonging exclusively to the Federal government and reserve the remaining areas to the States. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819) ("In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."); *Chisholm v. Georgia*, 2 U.S. (Dall.) 419, 435 (1793) (Iredell, J., dissenting) ("The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved."). The Founders did not consider sovereignty, itself, to be divisible once delegated completely to the Federal government in an enumerated area. The concept of sovereignty in the Eighteenth Century was that it was both inalienable and indivisible by the power possessing it. *See* HIDEAKI SHINODA, RE-EXAMINING SOVEREIGNTY 17 (2000). "Sovereignty, for the same reason as makes it inalienable, is indivisible; for will either is, or is not, general." *Id.* (quoting JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 20-21 (G.D.H. Cole trans., 1968) (1762)). The States and the Federal government are each sovereign in their respective areas.

The Court's decision in *Chisholm v. Georgia* was contrary to the understanding of the Founders because it ruled that a citizen could maintain a common-law action for payment of contractual debt against the States in Federal court. As demonstrated by Hamilton's writings, the Founders never intended for the States to relinquish

their authority in this area. THE FEDERALIST NO. 81 ("The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. . . . To what purpose would it be to authorize suits against States for the debts they owe?"). Unquestionably, however, the Founders understood that the States no longer would enjoy immunity in areas expressly ceded to Congress. Under the Founders' conceptualization of sovereignty, the States' cession of plenary authority in areas such as naturalization and bankruptcy necessarily included the surrender of their immunity from suit.

B. In Accordance with Eighteenth-Century Jurisprudence, The Founders' Conceptualization of Plenary Legislative Jurisdiction in an Area Necessarily Would Have Included Jurisdiction to Adjudicate.

Under the prevailing conceptualization of sovereignty held in the Eighteenth Century, the Founders understood that jurisdiction to adjudicate was a necessary corollary of legislative, or prescriptive, jurisdiction. In an area such as bankruptcy, over which Congress was granted plenary legislative authority, the States necessarily ceded their immunity from any adjudicative proceeding arising from bankruptcy laws prescribed by Congress. The Founders' understanding was that the greater power to legislate perforce included the lesser authority to adjudicate. The modern conceptualization of jurisdiction to prescribe as a separate and distinct power from jurisdiction to adjudicate is a sophistication of thought that did not exist in the Eighteenth Century. *See generally, Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2918 (1993) (Scalia, J., dissenting in part) (discussing the distinction between legislative and adjudicative jurisdiction as reflected in Twentieth Century commentaries). An examination of the most influential legal writings extant at the time evidences the state of the Founders' jurisprudential conceptualization of the correlation between sovereignty and jurisdiction.

By some accounts, William Blackstone's influence on the early American legal system was greater than that of any other legal scholar. *See* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 52 (1989). Blackstone's *Commentaries on the Laws of England* "constituted the preeminent authority" on English law for the Founders and heavily influenced their understanding of legal principles. *See Alden*, 527 U.S. at 715; *Nelson v. Carland*, 42 U.S. 265, 272 (1843) ("It may also be remarked, that Blackstone's Commentaries were in the hands of the members [of the convention], and frequently referred to."). With regard to legislative authority, Blackstone wrote that the power to prescribe law was the "greatest act of superiority" that one "being" could exercise over another. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *Of the Nature of Laws in General*, § 2 (1735). The authority to prescribe law thus resided with the supreme power of the state. *Id.* According to Blackstone, "[s]overeignty and legislature are indeed convertible terms; one cannot subsist without the other." *Id.*

In addition to Blackstone, another jurist who had substantial influence on the Founders was Emmerich de Vattel. *See* Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 Nw. U. L. Rev. 1027, 1061-63 (2002) (discussing Vattel's THE LAW OF NATIONS, published in 1758, as "one of the

most influential legal treatises in American constitutional law"). This Court itself has referenced Vattel's *The Laws of Nations* in an estimated 161 of its decisions rendered prior to 1945. *Id.* at 1061-62. Similar to Blackstone's *Commentaries*, Vattel's writings reveal a conceptualization of legislative jurisdiction that includes the jurisdiction to adjudicate as a necessary corollary of the former authority. When discussing the enforcement of law, Vattel wrote that "[t]he best laws are useless if they be not observed." EMMERICH DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, Book I, Ch. XIII, § 160 (1758). Vattel also recognized that a legislature with the authority to prescribe law also has the power to establish courts for adjudication: "As the nation may either reserve the legislative power to itself, or intrust [sic] it to a select body, – it also has a right, if it thinks proper, to establish a supreme tribunal to judge of all disputes, independently of the prince." *Id.* at § 161. Vattel's distinction between "the prince" and "the nation" demonstrates his opinion that the governmental body vested by the people with legislative authority naturally possessed the power to establish courts, i.e., the power to adjudicate.

Predating both Blackstone and Vattel, Thomas Hobbes summarized very succinctly the correspondence between legislative authority, sovereignty, and the nature of immunity. First, Hobbes recognized that legislative authority was that power which constituted sovereignty. "The Legislator in all Commonwealths is [alone] the Sovereign, be he one man, as in a monarchy, or one assembly of men, as in a democracy or aristocracy." THOMAS HOBBES, LEVIATHAN Ch. XXVI, § 1 at 140 (J.M. Dent & Sons Ltd. 1965) (1651). Second, he understood that the

sovereign enjoyed immunity precisely because it possessed the legislative authority. As Hobbes wrote:

> The Sovereign of a Commonwealth, be it an assembly or one man, is not subject to the civil laws. For having power to make and repeal laws, he may, when he pleaseth, free himself from that subjection by repealing those laws that trouble him, and making of new; and consequently he was free before. For he is free that can be free when he will: nor is it possible for any person to be bound to himself, because he that can bind can release; and therefore he that is bound to himself only is not bound.

Id. at Ch. XXVI, § 2.

Thus, Hobbes understood sovereign immunity to be a matter of basic logic, arising from the sovereign's authority to prescribe law. Immunity existed from suit because the sovereign could not bind itself to the laws which it alone could generate. This conceptualization of sovereign immunity continued into the Twentieth Century. *See also Kawananakoa v. Polybank*, 205 U.S. 349, 353, 27 S. Ct. 526, 527 (1907) ("A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.").

Sovereign immunity, therefore, did not have its origins based on concerns of offending the sovereign dignity, but on the notion that the sovereign, which gave and had the power to rescind the law, simply could not bind itself. As a result, Hobbes believed the theoretical formulation of sovereign immunity was tied inextricably to the sovereign's jurisdiction to prescribe rather than upon a lesser

entity's lack of jurisdiction to adjudicate. A final indication of this proposition is apparent when Hobbes discussed jurisdiction to adjudicate as a necessary power included within the legislative authority:

> The Legislator known, and the laws either by writing or by the light of nature sufficiently published, there wanteth yet another very material circumstance to make them obligatory. For it is not the letter, but the intendment, or meaning; that is to say, the authentic interpretation of the law (which is the sense of the Legislator), in which the nature of the law consisteth; and therefore the interpretation of all laws dependeth on the Authority Sovereign; and the interpreters can be none but those which the Sovereign, to whom only the subject oweth obedience, shall appoint. For else, by the craft of an interpreter, the law may be made to bear a sense contrary to that of the Sovereign, by which means the interpreter becomes the Legislator.

Id. at Ch. XXVI, § 8.

Thus, to Hobbes, the sovereign authority to prescribe law *ipso facto* encompassed the power to adjudicate.

Justice Iredell, in his dissenting opinion in *Chisholm v. Georgia*, effectively recognized this principle. As his dissent reflected, Justice Iredell was concerned only with the scope of the judicial power to permit suits by individuals against the States for common-law causes of action. *Chisholm*, 2 U.S. (Dall.) at 449 (Iredell, J., dissenting) ("But it affords no reason whatever for the Court admitting a new action to fit a case, to which no old ones apply, when the application of law, not the making of it, is the sole province of the Court."). According to Justice Iredell,

Congress, possessing the legislative authority of the general government, had the authority to provide the Court with jurisdiction over suits against the States. *Id.* at 433-34, 448 & 449. He objected to maintenance of the suit against the State of Georgia only because Congress had not provided a specific law authorizing the suit. *Id.* at 449. But Justice Iredell unquestionably recognized that if Congress chose to act pursuant to its Constitutional authority, it could pass a new law permitting suits against the States. *Id.* at 448-49. He wrote that "[a] State is altogether exempt from the jurisdiction of the Courts of the United States, or from any other exterior authority, unless, in the special instances where the general Government has power derived from the Constitution itself." *Id.* at 448. In sum, Justice Iredell considered the entirety of the judicial authority as being received "from the Legislature only." *Id.* at 432.

As Justice Iredell's comments further reflect, legal scholars in the late Eighteenth Century viewed the concept of jurisdiction predominantly in terms of territorial sovereignty. Justice Iredell's conceptualization of territorial sovereignty was apparent in his statement regarding State exemption "from the jurisdiction of the Courts of the United States, *or from any other exterior authority*." *Id.* at 448 (emphasis added). This territorial limitation on Congress' legislative jurisdiction continued into, and throughout, the Nineteenth Century, as reflected by this Court's decisions regarding the United States' lack of jurisdiction over foreign sovereigns. As this Court stated in holding that a Federal revenue act did not apply to a French vessel:

> The laws of no nation can justly extend beyond its own territories, except so far as regards its

> own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction.

The Apollon, 22 U.S. 362, 370 (1824) (Story, J., for the Court).

Justice Story, the author of the opinion for the Court in *The Apollon,* later wrote, "every nation possesses an exclusive sovereignty and jurisdiction within its own territory." JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 19, 21-22 (2d ed. 1841). Justice Story considered the principle to be self-evident that a nation's legislative authority was limited by the extent of the territory over which it was sovereign. *Id.* at § 20. The courts of the United States could not adjudicate claims against foreign sovereigns because the United States government lacked the authority to prescribe laws beyond the country's territorial boundaries.

This Court's decisions well into the Nineteenth Century were guided by principles of international law when resolving questions of conflicting sovereignty and continued to reflect a strict territorial understanding of jurisdiction. *See, e.g., D'Arcy v. Ketchum*, 52 U.S. 165, 174 (1850). As the States and Federal government share the same geographic territory, however, the Founders divided sovereignty between the Federal government and the States based on particular areas of authority. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) at 410. For the purpose of determining the scope of their respective powers, the Court

has held that the States and Federal government must be treated as if they had been formed at the same time. *Id.* As a result, the States collectively and the Federal Union "each [became] sovereign with respect to the objects committed it, and neither sovereign with respect to the objects committed to the other." *Id.* Even Justice Iredell recognized that "[t]he United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved." *Chisholm*, 2 U.S. (Dall.) at 435 (Iredell, J., dissenting). *See also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 151-52 (Little Brown 1891) (1833) ("[T]he state, by which we mean the people composing the state, may divide its sovereign powers among various functionaries, and each in the limited sense would be sovereign in respect to the powers confided to each, and dependent in all other cases.").

Thus, in accordance with Eighteenth Century jurisprudence, the Founders' understanding of sovereignty would have included certain indisputable principles. First, the authority to prescribe law included by necessity the power to adjudicate. Although these functions might be allocated to separate bodies within government, the sovereign's legislative authority encompassed the secondary power. Second, the Founders understood that the sovereign's authority to prescribe was itself the basis for sovereign immunity from judicial process. As the source of law, the sovereign could not bind itself to its restrictions. The source of immunity, therefore, was not based on any concept that the written law extended to the sovereign but merely was unenforceable; rather, the prescriptive extent of the written law itself could not reach the sovereign as a matter of elementary logic. Finally, the Founders understood sovereignty as being strictly restrained by territorial

limits. The sovereign had supreme authority only within the borders of the nation.

Understanding these principles, the Founders could not have reconciled the States' express grant to the Federal government of complete legislative jurisdiction in a particular area with the States' retention of immunity. The Founders compromised the balance between Federal-State relations by enumerating respective areas of authority, ceding certain powers to the Federal government. Based on their understanding of sovereignty as supreme but territorially limited authority, this was the most logical way to balance power within a dual-sovereign system. As both shared the same territory, neither could have supreme authority over all areas of governing. So, the Founders enumerated the powers appropriate for Federal authority and reserved the remaining ones to the States. *See* THE FEDERALIST NO. 39 (James Madison) (discussing the States' retention of "residual and inviolable sovereignty over all other objects" not enumerated as in the Constitution as belonging to the Federal government). In areas over which the Federal government was sovereign, the States would have no claim to immunity for the simple fact that they were not sovereign.

In the area of bankruptcy, the Founders properly determined that the States should cede complete legislative authority to the Federal government. THE FEDERALIST NOS. 32 & 81. The unique language the Founders used to provide Congress with the power to establish "uniform laws on the subject of bankruptcy" confirmed the exclusive trust of this area to the Federal government. *See* THE FEDERALIST NO. 32 (Hamilton, discussing Congress' comparable authority over naturalization, recognized: "This [power] must necessarily be exclusive; because if

each State had power to prescribe a DISTINCT RULE, there could be no UNIFORM rule."). As the Founders considered the passage of bankruptcy laws to be a uniquely Federal power, they engaged in little debate about it. *See* THE FEDERALIST NO. 42. Thus, the States relinquished complete legislative authority over bankruptcy to the Federal government. The Federal government therefore became the supreme sovereign in this area. Therefore, based on the Founders' understanding of sovereignty and sovereign immunity, the States necessarily surrendered any immunity to the laws prescribed by Congress as the authority possessing this legislative authority. Any other conclusion would require the attribution of a conceptualization of jurisdiction to the Founders which they did not possess and which would have seemed illogical to them.

C. The Court's Decisions Confirm Congress Has Supreme Authority Over Bankruptcy.

In numerous opinions, this Court has recognized that Congress' authority to legislate in the field of bankruptcy is unique among its powers. In the Court's first opinion addressing the Bankruptcy Clause, Chief Justice Marshall wrote:

> The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States.

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193-94 (1819).

Without doubt, the scope of the Founders' grant of authority to Congress over bankruptcy went beyond that which they had provided in other subject areas. This Court has held on numerous occasions that Congress' authority on the subject of bankruptcy is unrestricted and total.

When construing the Bankruptcy Act of 1841, the Court concluded that the Founders, being familiar with the English laws on bankruptcy, had provided Congress with the power to legislate beyond the scope of the English acts. *Nelson v. Carland*, 42 U.S. 265, 279-80 (1843). As the Court wrote when interpreting the broad scope of Congress' authority:

> In considering the question before me, I have not pretended to give a definition; (but purposely avoided any attempt to define) the mere word, BANKRUPTCY. It is employed in the Constitution in the plural, and as part of an expression; 'the subject of bankruptcies.' The ideas attached to the word in this connection, are numerous and complicated; they form a subject, of extensive and complicated legislation; of this subject Congress has general jurisdiction; and the true inquiry is – To what limits is that jurisdiction restricted?

Id. at 280-81.

The English acts, with which the Founders were familiar, had not permitted a debtor to commence an action to declare his own bankruptcy, authorizing only the commencement of such proceedings by the debtor's creditors. *Id.* at 279. The "framers of the Constitution" had recognized the need for Congress to exceed the limits of English bankruptcy law and, therefore, had granted it the power "to secure . . . a uniform law." *Id.* "Few provisions in the

Constitution have had more beneficial consequences than this. . . ." *Id.* at 280.

Fifty-nine years after its decision in *Nelson v. Carland*, the Court reaffirmed its interpretation of Congress' broad authority over bankruptcy. The Court wrote that "[t]he framers of the Constitution were familiar with Blackstone's Commentaries, and with the bankrupt laws of England, yet they granted plenary power to Congress over the whole subject of 'bankruptcies,' and did not limit it by the language used." *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 187 (1902). Subsequently, in *Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co.*, the Court examined the bankruptcy acts passed by Congress in 1800, 1841, and 1867 and noted that the acts reflected the progressively expanding liberalization of the law on the subject of bankruptcies. 294 U.S. 648, 670-71 (1935). The Court noted that in each instance it had approved or accepted these extensions as falling within the power conferred by the Bankruptcy Clause of the Constitution. *Id.* at 671. The Court concluded that the broad scope of the power conferred upon Congress had permitted it "to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day." *Id.* According to the Court, "[s]o much necessarily results from the nature of the power, and this must have been within the contemplation of the framers of the Constitution when the power was granted." *Id.* at 680-81.

Moreover, this Court has recognized in various contexts that States have no authority in the area of bankruptcy, as Congress' power in this field is plenary. The Court has held that Federal bankruptcy courts can bar the claims of States against a debtor if not timely filed, as

"[t]he Federal government possesses supreme power in respect of bankruptcies." *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933). The U.S. Constitution provided the Federal government with this power as it "clothes the Congress with power to establish uniform laws on the subject of bankruptcies." *Id.* at 331. As the Court further has held:

> The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount. The purpose to exclude state action for the discharge of insolvent debtors may be manifested without specific declaration to that end; that which is clearly implied is of equal force as that which is expressed. . . . In respect of bankruptcies the intention of Congress is plain. The national purpose to establish uniformity necessarily excludes state regulation.

Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929) (citations omitted).

Thus, this Court's opinions have recognized that the States granted plenary legislative authority to Congress in the area of bankruptcy. Through this grant of plenary power to Congress, the States surrendered their authority over the subject.

II. STATE SOVEREIGN IMMUNITY IS NOT COMPATIBLE WITH CONGRESS' AUTHORITY TO PASS "UNIFORM LAWS ON THE SUBJECT OF BANKRUPTCIES."

If Congress did not have the authority to abrogate the states' sovereign immunity pursuant to the Bankruptcy Clause, the central foundation of the bankruptcy system

would be undermined severely. The core purpose of the bankruptcy system established by Congress was to establish a single forum in which a debtor can bring all of its creditors together to distribute the assets of the bankrupt's estate in an equitable manner. To achieve this purpose, Congress passed legislation providing that "[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(e) (1994).

Congress long has provided for similarly broad jurisdiction in the earlier versions of the Bankruptcy Act. As this Court recognized when construing the "Bankrupt Act of 1841":

> [I]t is manifest that the purposes so essential to the just operation of the bankrupt system could scarcely be accomplished except by clothing the courts of the United States sitting in bankruptcy with the most ample powers and jurisdiction to accomplish them; and it would be a matter of extreme surprise if, when Congress had thus required the end, they should at the same time have withheld the means by which alone it could be successfully reached. Accordingly we find that by the 6th section of the act it is expressly provided, "that the District Court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act, and any other act which may hereafter be passed on the subject of bankruptcy. . . ."

In re Christy, 44 U.S. 292, 312-13 (1841).

By way of further example, Section 23(a) of the 1898 Bankruptcy Act established jurisdiction of all controversies, both legal and equitable, in the United States circuit courts. This Court interpreted section 23(a) of the 1898 Act as requiring a single forum for the determination of all issues pertaining to a bankrupt's estate, stating:

> We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of a [sic] administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment is [sic] regular course, and the supervision and control of the trustees and others who are employed to assist them.

United States Fidelity & Guaranty Co. v. Bray, 225 U.S. 205, 217 (1912).

Further, the Court long has recognized that Congress' provision of a single forum for the resolution of all issues is within its authority to establish a uniform system of bankruptcy. As this Court stated, "Congress has the right to establish a uniform system of bankruptcy throughout the United States; and, having given jurisdiction to a particular district court to administer and distribute the property, it may, in some proper way, in such a case as this, call upon all interested to appear and assert their rights." *In re Wood*, 210 U.S. 246, 254 (1908). The Court thus recognized Congress' unique and plenary authority to provide a bankruptcy court with the authority to recover preferential transfers to parties who are beyond the state

or district in which the bankruptcy court is located. *Id.* at 252-53. The "chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.'" *Katchen v. Landy*, 382 U.S. 323, 328 (1966) (quoting *In re Christy*, 44 U.S. (3 How.) 292, 312 (1841)).

Congress' longstanding requirement of a single forum in which all creditors of a debtor must assert their claims has created a fair and efficient procedure for resolving the myriad issues associated with a bankruptcy. As the National Bankruptcy Review Commission ("NBRC") recognized:

> By providing a single forum governed by a single set of procedural rules, the bankruptcy process ensures uniform procedural treatment for every type of claimant, including secured creditors, unsecured trade creditors, priority tax claimants, environmental claimants, child support claimants, employee and pension claimants, tort victims, bondholders, and equity security holders. A single bankruptcy forum also advances a variety of fundamental policy goals, including, equal distribution and treatment for similarly-situated creditors, promotion of a cost-effective and speedy process to minimize the cost to creditors, and the rehabilitation of individuals as well as business entities. Determining creditors' rights in the debtor's estate is a fundamental role of the bankruptcy court.

NAT'L BANKR. REV. COMM'N, FINAL REPORT, BANKRUPTCY: THE NEXT TWENTY YEARS, *State Sovereign Immunity In Bankruptcy After Seminole Tribe of Florida v. Florida* (Oct. 20, 1997), *available at http://govinfo.library.unt.edu/nbrc/report/01title.html*.

As the NBRC further noted, a single forum for the adjudication of all claims against a bankruptcy estate is a "critical component" of the bankruptcy court's fulfillment of its role of determining creditors' rights. *Id.* If the bankruptcy court did not have the authority to resolve all claims in a single forum, the resultant multiple proceedings in different courts would lead to inconsistent and conflicting determinations regarding the rights in a debtor's estate. *Id.* In addition to contradictory determinations of rights in a debtor's property, multiple proceedings would result in disparate treatment of similarly-situated creditors. *Id.* Furthermore, multiple proceedings substantially would impair a bankruptcy court's ability to restructure a debtor's obligations quickly and efficiently, thereby diminishing the potential for effective reorganization of businesses, family farms, and individuals. See *id.*

The single forum particularly advances the corporate reorganization policies underlying Chapter 11 of the Bankruptcy Code, by permitting the preservation of going-concern value, the retention of jobs, and the efficient use of capital. *Id.* If a bankruptcy court could not control all critical aspects of a Chapter 11 debtor's business, reorganization would not be possible. *Id.*

As the NBRC recognized, the bankruptcy court's ability to give notice to all interested parties and require their appearance before a single court permits a final, binding determination of the rights in a debtor's property. *Id.* This advantage of the bankruptcy system would be lost if all parties with claims against the debtor were not required to present their claims in the same court. *Id.*

Additionally, the efficiency of administration gained by bringing all matters within one court substantially

reduces the cost of collection for creditors. *Id.*[2] Creditors frequently have overlapping interests in the debtor's property, and "multiple proceedings would require creditors to participate in each proceeding to protect their interests, greatly increasing their cost of collection." *Id.* The single forum also maximizes the estate's efficient recovery of assets owed, or belonging, to the estate for the benefit of all creditors by increasing the amount available for distribution. *See generally* Elizabeth Warren, *Bankruptcy Policy*, 54 U. Chi. L. Rev. 775, 785 (1987) ("In bankruptcy, with an inadequate pie to divide and the looming discharge of unpaid debts, the disputes center on who is entitled to shares of the debtor's assets and how these shares are to be divided. Distribution among creditors is not incidental to other concerns; it is the center of the bankruptcy scheme."). Therefore, without Congressional abrogation of state sovereign immunity, multiple proceedings would be required against State entities in their respective courts. This multiple-proceeding scenario would occur most often in complex corporate bankruptcies filed pursuant to Chapter 11.

The bankruptcy case of Wallace's Bookstores, Inc., for which Katz is acting as the Liquidating Supervisor, provides an excellent example of a large corporate bankruptcy that would have entailed numerous, costly proceedings against numerous state entities in multiple courts. Prior to filing its petition for bankruptcy, Wallace's Bookstores had contractual relationships with forty-five separate state

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[2] *See also In re Christy*, 44 U.S. 292, 312 (1841) ("The obvious design of the Bankrupt Act of 1841 ... was to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.").

colleges and universities located in twenty-three states, pursuant to which it owned, managed or operated the campus bookstores for these institutions. Subsequent to Wallace's Bookstores' petition for bankruptcy, Katz was required to file adversary proceedings against most of these institutions for the recovery of preferential payments made within ninety days prior to the petition and for accounts receivable owed by the colleges to the bookstore chain.

If Congress lacks the authority to abrogate state sovereign immunity, then a bankrupt estate such as that of Wallace's Bookstores would have to pursue recovery against State entities in their respective courts, solely on the basis of state law causes of action to the extent any exist. *See Alden v. Maine*, 527 U.S. 706, 730 (1999) (barring federal causes of action against States in state courts). By way of illustration, many States, though by no means all, have enacted preference statutes similar to the Federal cause of action codified at 11 U.S.C. § 547(b), which permits the recovery of transfers made by the debtor in preference of one creditor to the detriment of the debtor's other creditors. *See* AMERICAN BANKRUPTCY INSTITUTE, ABI PREFERENCE HANDBOOK 55 (David Wheeler Moore & Van Allen PLLC eds., 2002). Similar to the Federal preference action, these state statutes require proof of a transfer of the debtor's property during a time at which the debtor was insolvent. *See, e.g.*, FLA. STAT. ANN. § 726.106 (West 1987); KY. REV. STAT. ANN. § 378.060 (Banks-Baldwin 1981); N.J. STAT. ANN. §§ 2A:19-2 and 2A:19-3 (West 2000). Thus, in a large Chapter 11 bankruptcy, the trustee or liquidating supervisor would be forced to re-litigate the issue of insolvency in multiple

state-court proceedings if sovereign immunity precludes a single action in bankruptcy court.

If States enjoy immunity from Federal bankruptcy proceedings, Congress' ability to provide a single forum for the distribution of a debtor's estate will be impossible. This Court's decision will impact bankruptcy cases far more complex than presented by the case *sub judice*. The central purpose of the Bankruptcy Code is to consolidate all matters pertaining to the distribution of a debtor's assets to its various creditors. If the Court concludes that section 106(a) is unconstitutional, then States not only will be treated differently from non-state creditors, but some States will be treated more fairly than other States, as some of them provide causes of action for the recovery of preferential transfers, etc., while others do not. The lack of consistency among state laws will defeat Congress' ability to provide for a uniform system of bankruptcy laws. Further, by way of the above example, among States providing recovery of preferential transfers, the inevitability of inconsistent determinations is readily apparent, as central issues such as insolvency will be submitted to multiple adjudications. In addition to inconsistent results, the heavy financial and administrative burdens associated with a bankruptcy estate's pursuit of litigation against multiple State creditors in various proceedings would be substantial and frequently cost prohibitive. The effect would be to reduce the ultimate distribution and recovery to other creditors, including other State creditors of the estate. *See* Steven M. Richman, *More Equal Than Others: State Sovereign Immunity Under The Bankruptcy Code*, 21 Rutgers L.J. 603, 631-32 (1990).

As a result, State retention of sovereign immunity would be incompatible with Congress' ability to establish a

uniform system of bankruptcy law and would contradict the broad grant of authority provided to Congress by the Bankruptcy Clause. The opinion of the U.S. Court of Appeals for the Sixth Circuit was correct not only because the court properly interpreted the intent of the Founders, but also because it furthers these practical considerations.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

P. ANTHONY SAMMONS
ALLEN E. GRIMES, III
DINSMORE & SHOHL, LLP
250 W. Main St., Suite 1400
Lexington, Kentucky 40507
(859) 425-1000
(859) 425-1099 (FACSIMILE)

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